Tan Chwee Hock v AmBank (M) Bhd (previously known as AmFinance Bhd)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-03(IM)-155 OF 2010
MOHD HISHAMUDIN, CLEMENT SKINNER AND ANANTHAM KASINATHER JJCA
17 JANUARY 2012

Bankruptcy — Notice — Setting aside — Application to set aside bankruptcy notice ('BN') dismissed — Appeal against — BN filed more than six years after date of judgment on which it was based — Whether respondent should obtain leave of court to issue BN after six years — Whether BN void — Whether amount claimed in BN in accordance with terms of judgment — Bankruptcy Act 1967 s 3(1)(i) & (2) — Rules of the High Court 1980 O 46 r 2(1)(a)

After obtaining a monetary judgment against the appellant/judgment debtor ('the appellant'), the respondent/judgment creditor ('the respondent') proceeded with bankruptcy proceedings against the appellant. The appellant applied to set aside the bankruptcy notice ('the BN') issued against him by the respondent bank on the grounds that the BN was invalid and void. The application was dismissed by the registrar. The appellant appealed to the Judge of the High Court against the decision of the registrar. Before the High Court the appellant maintained that the BN, which had been issued six years after the date of the judgment on which it was based, was void pursuant to s 3(1)(i) of the Bankruptcy Act 1967 ('the Act') unless the respondent had obtained the prior leave of the court under O 46 r 2(1)(a) of the Rules of the High Court 1980 ('the RHC'). The High Court judge applied the decision of the Federal Court in *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253 (*Lim Ah Hee's case*) and held that no leave of the court was required to issue a BN after six years. The High Court thus dismissed the appellant's appeal to set aside the BN. This was the appellant's appeal against that decision. In his appeal the appellant relied on two grounds, namely that the BN was void because of the respondent's failure to comply with O 46 r 2 of the RHC 1980; and that the BN was bad in law for not being in accordance with the terms of the judgment as required by s 3(1)(i) of the Act.

Held, allowing the appeal with costs:

(1) (per **Mohd Hishamudin** and **Clement Skinner JJCA**) Only persons who qualified as creditors to file a BN under s 3(1)(i) of the Act were entitled to enforce the judgment. However, in the present case, the judgment on which the BN was based was more than six years old, and

the respondent had not applied for leave pursuant to O 46 r 2(1)(a) of the RHC to enforce the writ of execution. As such, the respondent was not the person for the time being entitled to enforce a judgment or issue a BN as a creditor who had obtained a final judgment for the purpose of the proviso to s 3(1)(i) of the Act. Accordingly, the respondent had no right to file the BN and the BN filed herein, which was bad in law, had to be set aside (see paras 16 & 33).

(2) (per **Mohd Hishamudin** and **Clement Skinner JJCA**) The issues before the Federal Court in *Lim Ah Hee's* case did not concern O 46 r 2(1)(a) of the RHC. Thus the judicial pronouncement that 'no leave of court was necessary to issue a BN after six years as required by O 46 r 2 of the RHC' was purely obiter dicta. Further, the pronouncements of Abdul Hamid Mohamad, FCJ, in *Lim Ah Hee's* case were said per incuriam as he did not consider the proviso to s 3(1)(i) of the Act. Accordingly, this court was not bound by the decision in *Lim Ah Hee's* case. In any case, contrary to what was said by the FCJ in that case, the majority of the reported Malaysian cases hold the view that for the purpose of bankruptcy proceedings, leave was required under O 46 r 2 (1)(a) of the RHC where there had been a lapse of six years or more (see paras 17–19, 29–30).

(3) (per **Mohd Hishamudin JCA**) When the terms of the judgment were compared with the terms of the bankruptcy notice, there were discrepancies. This supported the appellant's second ground of appeal that the BN was not in accordance with the terms of the judgment and was thus bad in law (see paras 24 & 26).

(4) (per **Clement Skinner JCA**) The appellant's complaint that the BN was not in accordance with the terms of the judgment was a matter going to the calculation of the amount due under the judgment. As such it was a matter that came within the scope of proviso (ii) of s 3(2) of the Act, rather than a jurisdictional challenge under s 3(1)(i). In the circumstances, the challenge should be raised within seven days of the service of the BN, which was not done by the appellant. Thus this ground of appeal ought to be dismissed (see para 35).

(5) (per **Anantham Kasinather JCA**, dissenting) Notwithstanding the decision that the pronouncements of Abdul Hamid Mohamad, FCJ, in *Lim Ah Hee's* case were obiter, in essence the FCJ's reasoning was that since bankruptcy proceedings fell within the definition of an 'action' under s 6(3) of the Limitation Act, a judgment creditor had 12 years to pursue bankruptcy proceedings. By the same token, since bankruptcy proceedings were not execution proceedings, O 46 r 2(1)(a) was not applicable to determine the validity of a BN. Thus there was no merit in the first ground raised by the appellant in this appeal (see paras 42, 44 & 52).

(6) (per **Anantham Kasinather JCA**, dissenting) The appellant's argument that the BN was void since it did not comply with the terms of the judgment it was based on was a matter involving quantum and accordingly ought to have been challenged by the appellant within seven days of the service upon him of the BN. Since he had not mounted such a challenge, he could no longer rely on this ground as a basis to challenge the validity of the BN (see para 53).

[Bahasa Malaysia summary

Setelah mendapat penghakiman berbentuk wang terhadap perayu/penghutang penghakiman ('perayu'), responden/pemiutang penghakiman ('responden') telah memulakan prosiding kebankrapan terhadap perayu. Perayu telah memohon untuk mengetepikan notis kebankrapan ('NK') yang dikeluarkan terhadapnya oleh reponden bank atas alasan bahawa NK itu adalah tidak sah dan terbatal. Permohonan itu telah ditolak oleh pendaftar. Perayu telah merayu kepada hakim Mahkamah Tinggi terhadap keputusan pendaftar itu. Di hadapan Mahkamah Tinggi perayu menegaskan bahawa NK itu yang telah dikeluarkan enam tahun dari tarikh penghakiman yang mana menjadi asasnya, adalah terbatal menurut s 3(1)(i) Akta Kebankrapan 1967 ('Akta tersebut') kecuali responden telah memperoleh kebenaran terdahulu daripada mahkamah di bawah A 46 k 2(1)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Hakim Mahkamah Tinggi telah menggunapakai keputusan Mahkamah Persekutuan dalam kes *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253 (*'kes Lim Ah Hee'*) dan memutuskan tidak ada kebenaran mahkamah yang diperlukan untuk mengeluarkan NK selepas enam tahun. Mahkamah Tinggi dengan itu telah menolak rayuan perayu untuk mengetepikan keputusan tersebut. Dalam rayuannya perayu bergantung kepada dua alasan, iaitu bahawa NK itu adalah tidak sah kerana kegagalan responden untuk mematuhi A 46 k 2 KMT; dan bahawa NK itu tidak sah di sisi undang-undang kerana tidak menurut terma-terma penghakiman sebagaimana dikehendaki oleh s 3(1)(i) Akta tersebut.

Diputuskan, membenarkan rayuan dengan kos:

(1) (oleh **Mohd Hishamudin** dan **Clement Skinner HHMR**) Hanya mereka yang layak sebagai pemiutang untuk memfailkan NK di bawah s 3(1)(i) Akta tersebut berhak menguatkuasakan penghakiman tersebut. Walau bagaimanapun, dalam kes ini, penghakiman tersebut yang mana NK itu diasaskan adalah lebih daripada enam tahun, dan responden tidak memohon kebenaran menurut A 46 k 2(1)(a) KMT bagi menguatkuasakan writ pelaksanaan. Oleh itu, responden bukan seorang yang berhak menguatkuasakan penghakiman atau mengeluarkan NK sebagai pemiutang pada masa itu yang telah mendapat penghakiman muktamad bagi tujuan proviso kepada s 3(1)(i) Akta tersebut. Oleh demikian, responden tiada hak untuk memfailkan NK itu dan NK yang

telah difailkan di sini, yang salah di sisi undang-undang, hendaklah diketepikan (lihat perenggan 16 & 33). A

(2) (oleh **Mohd Hishamudin** dan **Clement Skinner HHMR**) Isu-isu di hadapan Mahkamah Persekutuan dalam kes *Lim Ah Hee tidak melibatkan* A 46 k 2(1)(a) KMT. Oleh itu keputusan kehakiman bahawa tiada kebenaran mahkamah diperlukan untuk mengeluarkan NK selepas enam tahun sebagaimana dikehendaki oleh A 46 k 2 KMT adalah *obiter dicta* semata-mata. Selanjutnya, keputusan Abdul Hamid Mohamad HMP, dalam kes *Lim Ah Hee dikatakan per incuriam* kerana beliau tidak mengambil kira s 3(1)(i) Akta tersebut. Oleh itu, mahkamah ini adalah tidak terikat dengan keputusan kes *Lim Ah Hee*. Dalam apa keadaan, bertentangan dengan apa yang dikatakan oleh HMP dalam kes tersebut, kebanyakan daripada kes-kes yang dilaporkan di Malaysia memutuskan bahawa bagi tujuan prosiding kebankrapan, kebenaran adalah perlu di bawah A 46 k 2(1)(a) KMT di mana terdapat tempoh luput melebihi enam tahun (lihat perenggan 17–19, 29–30). B C D

(3) (oleh **Mohd Hishamudin HMR**) Apabila terma-terma penghakiman dibandingkan dengan terma-terma notis kebankrapan, tiada percanggahan. Ini menyokong alasan rayuan kedua perayu bahawa NK itu tidak menurut terma-terma penghakiman dan dengan itu salah di sisi undang-undang (lihat perenggan 24 & 26). E

(4) (oleh **Clement Skinner HMR**) Aduan perayu bahawa NK itu tidak menurut terma-terma penghakiman telah menjurus kepada pengiraan jumlah yang perlu dibayar di bawah penghakiman tersebut. Oleh itu ia adalah perkara yang terangkum ddalam skop proviso (ii) kepada s 3(2) Akta tersebut, dan bukan cabaran bidang kuasa di bawah s 3(1)(i). Dalam keadaan berikut, cabaran itu patut ditimbulkan dalam tempoh tujuh hari selepas penyampaian NK itu, yang tidak dilakukan oleh perayu. Oleh itu, alasan ini patut ditolak (lihat perenggan 35). F G

(5) (oleh **Anantham Kasinather HMR,** menentang) Walaupun keputusan bahawa pandangan Abdul Hamid Mohamad HMP, dalam kes *Lim Ah Hee* adalah *obiter*, yang penting adalah alasan HMP bahawa prosiding kebankrapan jatuh dalam definisi 'tindakan' di bawah s 6(3) Akta Had Masa, pemiutang penghakiman mempunyai 12 tahun untuk meneruskan prosiding kebankrapan. Begitu juga, jika prosiding kebankrapan bukan prosiding pelaksanaan, A 46 k 2(1)(a) tidak terpakai bagi menentukan kesahan NK itu. Oleh itu tidak ada merit dalam alasan pertama yang ditimbulkan oleh perayu dalam rayuan ini (lihat perenggan 42, 44 & 52). H I

(6) (oleh **Anantham Kasinather HMR,** menentang) Hujah perayu bahawa NK itu adalah tidak sah kerana ia tidak mematuhi terma-terma penghakiman yang mana ia diasaskan merupakan perkara yang

melibatkan kuantum dan sewajarnya patut dicabar oleh perayu dalam tempoh tujuh hari penyampaian NK itu ke atasnya. Oleh kerana dia tidak mengutarakan cabaran sedemikian, dia tidak lagi boleh bergantung kepada alasan ini sebagai asas untuk mencabar kesahan NK tersebut (lihat perenggan 53).]

Notes

For cases on setting aside, see 1(2) of *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3006–3050.

Cases referred to

A Bankruptcy Notice, Re [1898] 1 QB 383, CA (refd)
Berliner Industriesbank Aktiengesellschaft v Jost [1971] 1 QB 278, QBD (refd)
Chin Sin Lan v Delta Finance Bhd [2004] 3 MLJ 178; [2004] 3 CLJ 113, CA (refd)
Development Commercial Bank Bhd v Datuk Ong Kian Seng [1995] 2 MLJ 724, FC (refd)
Ide, ex parte Ide, Re (1886) 17 QBD 755, CA (refd)
J Raju a/l M Kerpaya v Commerce International Merchant Bankers Bhd [2000] 3 MLJ 177, CA (refd)
Lee Che Peh aka Lee Chee Peh, ex p Tractors Malaysia (1982) Sdn Bhd,Re [2003] 5 MLJ 463, HC (refd)
Low Mun v Chung Khiaw Bank Ltd [1988] 1 MLJ 263, SC (refd)
Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee [2004] 3 MLJ 253; [2004] 2 CLJ 787, FC (not folld)
Tengku Iskandar bin Tengku Ahmad v Sime Bank Bhdd [2002] 1 MLJ 312; [2002] 1 AMR 174, HC (refd)
V Gopal, Re: ex p Bank Buruh (M) Bhd [1987] CLJ (Rep) 602, HC (refd)
Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd [1989] 3 MLJ 508, HC (refd)
Woodall, ex p Woodall, Re (1884)13 QBD 479, CA (refd)

Legislation referred to

Bankruptcy Act 1967 s 3(1)(i), (2)(ii)
Bankruptcy Rules 1969 r 276
Limitation Act 1953 s 6(3)
Rules of the High Court 1980 O 46, O 46 r 2, r 2(1), r 2(1)(a)
Sarawak Limitation Ordinance (Cap 49)

Appeal from: Bankruptcy No D-29–1292 of 2009 (High Court, Kuala Lumpur)

T Gunaseelan (Gunaseelan & Associates) for the appellant.
(Raja Eleena Siew Ang & Associates) absent for the respondent.

Mohd Hishamudin JCA:

[1] This is an appeal by the appellant/judgment debtor against the decision of the learned High Court judge given on 31 May 2010 dismissing the judgment debtor's appeal to the judge in chambers.

[2] Earlier, the judgment debtor had appealed (via encl 14) to the judge in chambers against the decision of learned senior assistant registrar who had dismissed his application (via encl 11) to set aside a bankruptcy notice issued to him on the application of AmBank (M) Bhd, the respondent/judgment creditor.

[3] In the present case the bankruptcy proceeding is based on a monetary judgment obtained against the judgment debtor on 7 June 2002 from the High Court of Kuala Lumpur. However, the bankruptcy notice was only filed by the judgment creditor on 9 April 2009 and issued by the bankruptcy court on the same day. Thus it was applied for and issued almost seven years later after the judgment.

[4] In this appeal, Mr T Gunaseelan, learned counsel for the appellant/judgment debtor, raised two issues in his submission. During the hearing of submission, we, however, did not have the benefit of hearing argument from the respondent/judgment creditor as both the respondent/judgment creditor and its counsel were absent.

[5] Having heard submission, we reserved judgment.

[6] I shall now deliver my judgment.

[7] The first issue in this appeal is whether a judgment creditor can cause to be issued a bankruptcy notice under s 3(1)(i) of the Bankruptcy Act 1967 ('the Act') where the lapse in time between the date of the judgment and the date of the bankruptcy notice exceeds six years. It is the submission of learned counsel for the appellant/judgment debtor that a judgment creditor cannot lawfully file a bankruptcy notice pursuant to s 3(1)(i) of the Act after a lapse of six years or more from the date of judgment, unless prior leave of the High Court pursuant to O 46 r 2(1)(a) of the Rules of the High Court 1980 ('the RHC') has been obtained. It is contended that the bankruptcy notice is invalid and void. Learned counsel for the appellant/judgment debtor relies on the following cases:

(a) *V Gopal: Re ex p Bank Buruh (M) Bhd* [1987] CLJ (Rep) 602;

(b) *Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd* [1989] 3 MLJ 508;

(c) *Re Lee Che Peh aka Lee Chee Peh, ex p Tractors Malaysia (1982) Sdn Bhd* [2003] 5 MLJ 463;

(d) *Tengku Iskandar bin Tengku Ahmad v Sime Bank Bhd* [2002] 1 MLJ 312; [2002] 1 AMR 174; and

(e) *Chin Sin Lan v Delta Finance Bhd* [2004] 3 MLJ 178; [2004] 3 CLJ 113.

[8] In order to appreciate the issue, it is necessary to refer to the relevant provisions of the Act and the RHC. Section 3(1)(i) of the Act provides:

> 3 Acts of bankruptcy.
>
> (1) A debtor commits an act of bankruptcy …
>
> …
>
> (i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him … a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order,... and he does not within 7 days after service of the notice … comply with the requirements of the notice …
>
> Provided that for the purposes of this paragraph … any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order; …

[9] Order 46 r 2(1)(a) of the RHC provides:

> When leave to issue any writ of execution is necessary (O 46 r 2)
>
> (1) A writ of execution to enforce a judgment or order may not issue without the leave of the Court in the following cases, that is to say:
>
> (a) where six years or more have lapsed since the date of the judgment or order;

[10] At the High Court, when similar argument was raised by the appellant/judgment debtor, the learned judge rejected it based on the pronouncements of Abdul Hamid Mohamad FCJ (as he then was) in *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253; [2004] 2 CLJ 787.

[11] In *V Gopal, Re: ex p Bank Buruh Bhd* [1987] CLJ (Rep) 602. VC George J (as he then was) ruled that for the purpose of s 3(1)(i) a judgment creditor who has the right to file a bankruptcy notice must be 'a creditor who

has obtained a final judgment or order'; and such a judgment creditor is 'any person who is for the time being entitled to enforce a final judgment or final order'. According to the learned judge, where six years or more had lapsed since obtaining the final judgment or final order, a person is no longer entitled to enforce that final judgment or order unless he has obtained prior leave of the court pursuant to O 46 r 2(1)(a) to issue a writ of execution. The learned judge based his ruling on two English cases, namely:

(a) *Re Ide, ex parte Ide* (1886) 17 QBD 755; and

(b) *Re Woodall, ex parte Woodall* (1884) 13 QBD 479.

[12] In the words of the learned judge:

> The principle expressed in those two English cases equally applies in the instant case. On the date that the bankruptcy notice was served on the debtor the creditor did not have a judgment on which execution could be proceeded with since to do so, by O 46 r 2(1)(a) leave of court had first to be obtained and that therefore on that date the creditor did not have a final judgment within the meaning of s 3(1)(i).
>
> What the proviso to s 3(1)(i) does is to define a creditor who has obtained a final judgment or final order within the meaning of that section as being 'any person who is for the time being entitled to enforce a final judgment or final order'. On the day that the bankruptcy notice was served, since six years had lapsed from the date of the judgment the petitioner was not entitled to enforce the judgment as he had not obtained the requisite leave as prescribed by O 46 r 2(1)(a).

[13] In *Wee Chow Yong* Edgar Joseph Jr J (as he then was) referred to and followed *Re Ide, Re Woodall* and *V Gopal*.

[14] In *Chin Sin Lan* Gopal Sri Ram JCA (as he then was) in delivering the judgment of the Court of Appeal said (at pp 116–117, but only by way of obiter dicta, as in that case leave under O 46 r 2(1)(a) of the RHC had already been obtained and the issue was only on the period of limitation under the Sarawak Limitation Ordinance (Cap 49)):

> Mr Venu Nair in a carefully developed argument has submitted that the bankruptcy proceedings in the High Court Miri were invalid because the bankruptcy notice was issued after the expiry of six years from the date of judgment on which it was based. He pointed out that the judgment was obtained on 23 September 1992 whereas the bankruptcy notice was only issued on 5 September 1999 after the expiry of more than seven years. At the centre of Mr Nair's argument lies the proviso to s 3(1)(i) of the Bankruptcy Act 1967, which is in the following terms:
>
> Provided that for purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce any final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order.

The words in the proviso to which we have lent emphasis were considered in two cases.

In *Re V Gopal; ex p Bank Buruh (M) Bhd* [1987] 1 CLJ 602; [1987] (Rep) 602, it was held that these words required a judgment creditor to obtain leave to issue execution under O 46 r 2(1)(a) of the Rules of the High Court 1980 before taking out bankruptcy proceedings on a judgment entered more than six years earlier, VC George J (as he then was), after discussing the English cases on the parallel English provision said:

What the proviso to s 3(1)(i) does is to define a creditor who has obtained a final judgment or final order within the meaning of that section as being 'any person who is for the time being entitled to enforce a final judgment or final order'. On the day that the bankruptcy notice was served, since six years had lapsed from the date of the judgment the petitioner was not entitled to enforce the judgment as he had not obtained the requisite leave as prescribed by O 46 r 2(1)(a).

Again, in *Wong Chow Yong t/a Vienna Music Centre v Public Finance Bhd* [1990] 1 CLJ 176; [1990] 3 CLJ (Rep) 349, Edgar Joseph Jr J (as he then was) held in terms similar to VC George J in *Re V Gopal* save that His Lordship expressed the view that the material date to determine whether a creditor is entitled to issue a bankruptcy notice is the date on which the notice was issued and not the date it was served on the judgment debtor.

To re-iterate, following the foregoing two decisions, a creditor who has obtained a judgment and sat on it for more than six years in West Malaysia must obtain leave of court before he can commence bankruptcy proceedings under s 3(1)(i) of the Bankruptcy Act.

[15] In the Federal Court case of *Low Mun v Chung Khiaw Bank Ltd* [1988] 1 MLJ 263 Mohamed Azmi SCJ, after setting out s 3(1)(i) of the Act, said (at p 265):

It is also essential that at the time of issue of the bankruptcy notice, the judgment creditor must be in the position to issue execution — see *Re Woodall, ex parte Woodall* (1894) 13 QBD 479.

[16] With respect, based on the above authorities cited, including the obiter dicta in the Court of Appeal case of *Chin Sin Lan* and the Federal Court case of *Low Mun*, I accept the submission of Mr Gunaseelan that since in the present case more than six years had lapsed since the date of judgment, and that no leave pursuant to O 46 r 2(1)(a) of the RHC had been obtained to enforce a writ of execution, then the judgment creditor is not a person for the time being entitled to enforce a final judgment for the purpose of the proviso to s 3(1)(i) of the Act; and that being the case he is not a creditor who has obtained a final judgment for the purpose of s 3(1)(i). Accordingly, the respondent/judgment creditor has no right to file the bankruptcy notice; and, therefore, the bankruptcy notice filed and issued herein must be set aside.

[17] I am, of course, mindful of the following dictum of Abdul Hamid Mohamad FCJ (as he then was) in *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253; [2004] 2 CLJ 787 that was relied upon by the learned High Court judge:

> A plaintiff who has obtained a judgment more than six years is not entitled to issue execution on it except with leave of the court or a judge as provided by O 42 r 23(a) (of the English Rules).
>
> It is this last sentence above that the case (*WT Lamb & Sons v Rider* [1948] 2 KB 331 (CA)) is an authority for. Furthermore, if we bear in mind that the words used in our O 46 r 2 of the RHC 1980 and in the English rules are 'A writ of execution to enforce a judgment …', clearly a bankruptcy notice or a bankruptcy petition cannot be 'a writ of execution'. So, in my view, our courts have been correct in holding the view that no leave of court is necessary to issue a bankruptcy notice after six years as required by O 46 r 2 of the RHC 1980. But, that does not answer the question posed to this court especially in view of the words 'or any other proceeding in court'.

[18] But the above pronouncement is mere obiter dicta as the issues before the Federal Court did not concern O 46 r 2(1)(a) of the RHC. In *Lim Ah Hee* the appellant filed a notice of motion applying for leave to appeal to the Federal Court against the decision of the Court of Appeal. The Federal Court granted leave to appeal to the appellant but only on the following questions:

(a) whether the second limb of s 6(3) of the Limitation Act 1953 is relevant and applicable to bankruptcy proceedings; and

(b) whether the impugned bankruptcy notice is valid under the provisions of s 3(2)(ii) of the Bankruptcy Act 1967 if the judgment debtor does not dispute that the claim stated in the bankruptcy notice is excessive within seven days from the date of service of the bankruptcy notice.

[19] Even then, with respect, the above dictum was also per incuriam; and I so hold for two reasons. Firstly, Abdul Hamid Mohamad FCJ in his judgment failed to take into account the proviso to s 3(1)(i) of the Act that I have referred to above. Secondly, contrary to what was said by the learned Federal Court judge, the Malaysian law reports show that the majority of the reported Malaysian cases hold the view that for the purpose of bankruptcy proceedings, leave is required under O 46 r 2(1)(a) of the RHC where there has been a lapse of six years or more.

[20] I now move on to the second issue raised by learned counsel for the appellant/judgment debtor. It is the contention of the appellant/judgment debtor that the bankruptcy notice is bad in law as the bankruptcy notice is not 'in accordance with the terms of the judgment' as required by s 3(1)(i). The judgment of the High Court dated 7 June 2002 provides that the judgment debtor pays the judgment creditor RM1,026,156.79 as at 22 March 2000,

together with interest thereon; and a further sum of RM3,234,539.73 together with costs of RM350. The judgment allows interest on the sum of RM3,234.539.73 at 3.5%pa on BLR from the date of maturity ('tarikh matang'). The judgment reads as follows:

DALAM MAHKAMAH TINGGI MALAYA Dl KUALA LUMPUR

(BAHAGIAN DAGANG)

GUAMAN NO: D1-22-1435-2000

ANTARA

ARAB-MALAYSIAN BANK BERHAD … PLAINTIF

DAN

1. FORMTEX MEDICAL SDN BHD
2. ANG GUAN SENG
3. TAN PENG HOCK … DEFENDAN
4. TAN CHWEE HOCK... DEFENDAN

BERTARIKH 7 HARIBULAN JUN 2002

PENGHAKIMAN

Defendan Pertama, Defendan Kedua, Defendan Ketiga dan Defendan Keempat setelah memasukkan kehadirannya dan menfailkan Pernyataan Pembelaan dalam tindakan ini dan Mahkamah setelah memerintahkan bahawa penghakiman sebagaimana yang diperuntukan kemudian daripada ini dicatatkan menyebelahi Plaintif terhadap Defendan Pertama, Defendan Kedua, Defendan Ketiga dan Defendan Keempat MAKA ADALAH PADA HARI INI DIHAKIMIKAN bahawa Defendan Pertama, Defendan Kedua, Defendan Ketiga dan Defendan Keempat hendaklah membayar kepada Plaintiff jumlah sebanyak (i) RM 1,026156-79 setakat 22.3.2000 (Pinjaman Overderaf) bersama-sama dengan faedah ke atas jumlah tersebut pada kadar 2.5% setahun atas kadar asas pinjaman (kadar asas pinjaman pada 22.3.2000 adalah 6.80% setahun) dan faedah penalty sebanyak 1% setahun di atas kadar tersebut di atas jumlah yang tertunggak dari 23.3.2000 sehingga tarikh penyelesaian penuh dan jumlah sebanyak (ii) RM3,234.539-73 setakat 20.3.2000 (Penerimaan Bankir) (Bankers Acceptance) bersama-sama dengan faedah ke atas jumlah tersebut pada kadar 3.5% setahun atas kadar asas pinjaman (kadar asas pinjaman pada 20.3.2000 adalah 6.80% setahun) dari tarikh matang sehingga tarikh penyelesaian penuh dan kos RM350-00.

Bertarikh pada 7 haribulan Jun 2002

[21] It is not clear from the above judgment as to what is meant by 'maturity date' ('tarikh matang'). Paragraph 6 of the respondent/judgment creditor's affidavit, far from trying to explain as to what is meant by 'tarikh matang', appears to me to contradict the terms of the judgment; for para 6 states:

6. Perenggan 5 dan 6 Afidavit Tan Chwee Hock adalah dinafikan. Saya menyatakan bahawa Notis Kebankrapan tersebut adalah berdasarkan dan mengikuti Penghakiman Mahkamah Tinggi Kuala Lumpur bertarikh 7.6.2002. Saya juga menyatakan bahawa dalam mengira jumlah hutang penghakiman (judgment debt) sebanyak RM3,234,539.73 setakat 20.3.2000, faedah yang terakru dari tarikh matang pinjaman-pinjaman Penerimaan Bankir (Bankers' Acceptance) yang berkenaan telah pun diambilkira.

[22] According to the above averment, what the respondent/judgment creditor is saying is that the sum of RM3,234,539.73 has already taken into account the interest calculated from the 'maturity date' ('faedah yang terakru dan tarikh matang pinjaman-pinjaman Penerimaan Bankir (Bankers' Acceptance) yang berkenaan telahpun diambilkira'). But this is not what the judgment says. According to the judgment, interest is to be calculated from the 'maturity date' ('tarikh matang' whatever these words mean) until full settlement of the sum of RM3,234,539.73; and this 'interest sum' so calculated is a different sum from the base sum of RM3,234,539.73. It is an additional sum.

[23] We shall now compare the above terms of the judgment with the terms of the bankruptcy notice. The bankruptcy notice reads:

PER: TAN CHWEE HOCK... Penghutang Penghakiman

EX-PARTE: AMBANK (M) BERHAD... Pemiutang Penghakiman

NOTIS KEBANKRAPAN

Kepada:

TAN CHWEE HOCK B 142

JALAN BATU KAPUR

TAMAN KOK LIAN 51200

KUALA LUMPUR

ADALAH DIBERI NOTIS bahawa dalam masa tujuh (7) hari selepas Notis ini disampaikan kepada kamu yang tidak termasuk hari penyampaian ini, kamu mestilah membayar kepada *AMBANK (M) BERHAD (dahulu dikenali sebagai AmFinance Berhad)* yang beralamat di Level 3 Menara Dion Jalan Sultan Ismail 50250 Kuala Lumpur wang sebanyak *RM1,388,090.07* setakat *9/4/2008* yang dituntut oleh mereka sebagai wang kena dibayar atas Penghakiman Muktamad yang didapati oleh mereka terhadap kamu di Mahkamah *Tinggi* di *Kuala Lumpur* dalam Guaman No. *D1 -22-1435-2000* bertarikh *7/6/2002* yang pelaksanaan atasnya telah tidak digantungkan; atau kamu mestilah membuat cagaran atau penyelesaian mengenai wang tersebut hingga memuaskan hati mereka atau memuaskan bagi Mahkamah; atau kamu mestilah memuaskan Mahkamah bahawa kamu ada sesuatu tuntutan-balas, tolakan, atau tuntutan silang terhadap mereka yang sama

banyaknya dengan atau melebihi wang dituntut oleh mereka dan yang mana kamu tidak dapat mengemukakan dalam tindakan dalam mana Penghakiman itu telah didapati.

BUTIR-BUTIR TUNTUTAN

Amaun Penghakiman	RM3,234,539-07
Tambah: Faedah pada kadar 3.5% setahun atas Kadar asas pinjaman dari 21/3/2000 hingga 20/7/2001	RM 444,514-38
	RM3,679,054-11
Kurang: Bayaran pada 20/7/2001	RM (250,000-00)
	RM3,429,054-11
Tambah: Faedah pada kadar 3.5% setahun atas Kadar asas pinjaman dari 21/7/2001 hingga 2/3/2004	RM 831,196-96
	RM4,260,251-07
Kurang: Bayaran pada 2/3/2004	RM (510,000-00)
	RM3,750,251-07
Tambah: Faedah pada kadar 3.5% setahun atas Kadar asas pinjaman dari 3/3/2004 hingga 11/10/2004	RM 187,736-23
	RM3,937,987-30
Kurang: Bayaran pada 11/10/2004	RM (143,401-37)
	RM3,794,585-93
Tambah: Faedah pada kadar 3.5% setahun atas Kadar asas pinjaman dari 12/10/2004 hingga 11/5/2005	RM 178,475-70
	RM3.973.061-63
Kurang: Bayaran pada 11/5/2005	RM (750,000-00)
	RM3,223,061-63
Tambah: Faedah pada kadar 3.5% setahun atas Kadar asas pinjaman dari 12/5/2005 hingga 14/11/2005	RM 156,870-38
	RM3.379.932-01
Kurang: Bayaran pada 14/11/2005	RM(1,500,000-00)
	RM 1,879,932-01
Tambah: Faedah pada kadar 3.5% setahun atas Kadar asas pinjaman dari 15/11/2005 hingga 12/1/2006	RM 29,332-09
	RM 1,909,264-10
Kurang: Bayaran pada 12/1/2006	RM (794,277-11)
	RM1,114,986-99
Tambah: Faedah pada kadar 3.5% setahun atas Kadar asas pinjaman dari 13/1/2006 hingga 6/6/2008	RM 273,103-08
Jumlah terhutang setakat 9/4/2009	RM 1,388,090-07

Bertarikh pada 9 haribulan April 2009

[24] It is to be noted from the above bankruptcy notice that interest of 3.5% is claimed in respect of the sum of RM3,234.539.73 (subject to deductions due to payments made from time to time) from 21 March 2000 until 6 June 2008. It is also to be noted that the words 'tarikh matang' are nowhere to be found in the bankruptcy notice. Instead the bankruptcy notice mentions the date '21 March 2000', a date that is not found in the judgment.

[25] The Court of Appeal in *J Raju a/l M Kerpaya v Commerce International Merchant Bankers Bhd* [2003] 3 MLJ 177, following the Federal Court case of *Low Mun*, allowed an appeal on the ground that the bankruptcy notice was not in accordance with the terms of the judgment. In that case there was an extra claim of RM80 in the bankruptcy notice. The court held:

> In our judgment, the following propositions may be distilled from a rationalisation of the authorities we have thus far discussed.
>
> (1) When determining an issue under the Act, it is incumbent upon the Court to accord its provisions a strict construction.
>
> (2) The consequence of such an approach to construction is that a bankruptcy notice that requires a debtor to pay a judgment debt otherwise than in accordance with the terms of the judgment founded is null and void ab initio. Hence, a debtor does not commit an act of bankruptcy if he makes default upon such a notice.
>
> (3) A challenge on the ground that a bankruptcy notice requires a debtor to pay a judgment debt otherwise than in accordance with the terms of the judgment may be taken at any time after service of the notice.

[26] Accordingly, I accept the contention of the appellant/judgment debtor on this second issue; and hence I hold that the bankruptcy notice is bad in law on this second ground.

[27] In conclusion, the appeal is allowed with costs. The order of the High Court is set aside. The bankruptcy notice is set aside as it is bad in law, a nullity ab initio.

Clement Skinner JCA:

[28] In this appeal only two issues were raised by the appellant in his efforts to have the bankruptcy notice which was issued against him set aside. The issues were:

(a) since the bankruptcy notice was filed more than six years after the date of the judgment on which it is based, whether leave of court must be

obtained under O 46 r 2 of the Rules of the High Court before the respondent can commence bankruptcy proceedings? ('the first issue'); and

(b) whether the amount claimed in the bankruptcy notice is in accordance with the terms of the judgment dated 7 June 2002? ('the second issue').

THE FIRST ISSUE: WAS LEAVE REQUIRED?

[29] The learned High Court judge held that no such leave was required as he applied the decision of the Federal Court in *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253. In that case His Lordship Abdul Hamid Mohamed FCJ (as he then was) expressed the view that since bankruptcy proceedings are not execution proceedings, 'our courts have been correct in holding the view that no leave of court is necessary to issue a bankruptcy notice after six years as required by O 46 r 2 of the RHC'.

[30] However, what was said by His Lordship in *Lim Ah Hee* was purely obiter dicta as a reading of that judgment shows that the Federal Court had only granted leave to appeal on two issues, namely; (i) whether the second limb of s 6(3) of the Limitation Act 1953 is relevant and applicable to bankruptcy proceedings, and (ii) whether a bankruptcy notice may be impugned under s 3(2)(ii) of the Bankruptcy Act 1967 if the judgment debtor does not dispute the claim stated in the bankruptcy notice within seven days of its service on him. Further what was said by His Lordship was said per incuram as he did not consider the proviso to s 3(1)(i) of the Bankruptcy Act 1967. Accordingly this court is not bound by the decision in *Lim Ah Hee*.

[31] In my judgment this issue is to be decided on a proper interpretation of s 3(1)(i) of the Bankruptcy Act 1967. In the cases of *V Gopal, Re ex p Bank Buruh (M) Bhd* [1987] CLJ (Rep) 602 and *Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd* [1989] 3 MLJ 508, the court, which was fully cognizant of the fact that bankruptcy proceedings are not execution proceedings had, after referring to the cases of *Re Ide, ex p Ide* (1886) 17 QBD 755 and *Re Woodall, ex p Woodall* (1884) 13 QBD 479, interpreted the provisions of s 3(1)(i) to mean that where a judgment is six years or older and leave to enforce that judgment has not been obtained under O 46 r 2 of the RHC, the person issuing a bankruptcy notice based on such a judgment is not a creditor who has obtained a final judgment within the meaning of s 3(1)(i).

[32] In my respectful view the cases of *V Gopal* and *Wee Chow Yong*, were correctly decided because whenever a bankruptcy notice is challenged on the grounds as was done here, the critical issue before the court is not whether

bankruptcy proceedings are execution proceedings but rather whether the person issuing the bankruptcy notice is a creditor who has obtained a final judgment or order within the meaning of s 3(1)(i), in that, (a) the creditor is a person who has obtained a final judgment against the debtor and 'execution thereon not having been stayed', and (b) the creditor 'is for the time being entitled to enforce' that final judgment on which the bankruptcy notice is based, because it is only when those conditions stated in (a) and (b) above are met, that the creditor is deemed to be a creditor who has obtained a final judgment under the proviso to s 3(1)(i).

[33] In this case it is not in dispute that the judgment on which the bankruptcy notice is based is more than six years old. It cannot also be dispute that the respondent is not for the time being entitled to enforce that judgment since leave of court to enforce that judgment has not been obtained under O 46 r 2 of the RHC. Accordingly, the respondent was not a creditor who has obtained a final judgment within the meaning of the proviso to s 3(1)(i). The bankruptcy notice that was issued out based on that judgment is therefore bad in law. On this ground alone I would allow the appeal with costs.

THE SECOND ISSUE: THE AMOUNT CLAIMED IN THE BANKRUPTCY NOTICE

[34] On the second issue, I find that whilst the appellant has couched his challenge against the bankruptcy notice in terms to make it appear that the amounts claimed in the bankruptcy notice is not in accordance with the terms of the judgment dated 7 June 2002, in that, whereas the judgment allows interest to be claimed on the judgment sum at 3.5%pa on base lending rate from the date of maturity ('tarikh matang'),the bankruptcy notice claims interest from 21 March 2000 which is a date before the judgment date, which according to the appellant cannot be the date of maturity otherwise the judgment would have clearly stated it. The appellant also complained that the sum of RM350 costs mentioned in the judgment is not claimed in the bankruptcy notice.

[35] I find that the appellant's complaint is a matter going to the calculation of the amount due under the judgment and is not a jurisdictional challenge under s 3(1)(i) as understood in the case of *J Raju a/l M Kerpaya v Commerce International Merchant Bankers Bhd* [2000] 3 MLJ 177. The appellant's challenge is really a matter coming within the scope of proviso (ii) of s 3(2) of the Act. Therefore the challenge must be raised within seven days of the service of the bankruptcy notice on the appellant, which was not done as the appellant filed his summons in chambers some five months after service of the bankruptcy notice on him (see *Development Commercial Bank Bhd v Datuk*

Ong Kian Seng [1995] 2 MLJ 724 and *Chin Sin Lan v Delta Finance Bhd* [2004] 3 MLJ 178; [2004] 3 CLJ 113). I would dismiss this ground of appeal.

Anantham Kasinather JCA (dissenting):

BACKGROUND FACTS

[36] By encl 11 the appellant judgment debtor applied to set aside the bankruptcy notice filed by the respondent bank. The learned registrar dismissed the application. The appellant by encl 14 appealed against the decision of the learned registrar to the learned judge of the High Court. The learned judge dismissed the appeal on 31 May 2010. The subject matter of the appeal is whether a judgment creditor can issue a bankruptcy notice under s 3(1)(i) of the Bankruptcy Act 1967 where the lapse in time between the date of the judgment and the date of the bankruptcy notice exceeds six years. The submission of counsel for the appellant was that since the bankruptcy notice in this case was issued after the lapse of six years and no leave of the court was obtained, the appeal ought to be allowed.

[37] Before us, counsel for the appellant relied on the same two grounds canvassed before the learned judge in moving the appeal. The two grounds were:

(a) the bankruptcy notice is invalid and void as the judgment creditor did not obtain the leave of the court under O 46 r 2(1)(a) of the Rules of the High Court 1980 ('RHC 1980'); and

(b) the bankruptcy notice is not in accordance with the terms of the judgment dated 7 June 2002.

[38] The learned judge dismissed the first ground of appeal based solely on the pronouncements of Tun Abdul Hamid Mohamad FCJ (as he then was) in the case of *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253; [2004] 2 CLJ 787. Before I proceed to consider the pronouncements of Tun Abdul Hamid Mohamad FCJ, it would be useful to highlight the pronouncements in the earlier cases dealing with the interplay between the proviso to s 3(1)(i) of the Bankruptcy Act 1967 and O 46 r 2(1)(a) of the RHC 1980. These cases have in the recent past been often cited as authority for the proposition that only persons who qualify as creditors to file a bankruptcy notice under s 3(1)(i) of the Bankruptcy Act, are entitled to enforce the judgment. To the extent that a judgment creditor cannot execute a judgment by way of a writ of execution without the leave of the court on the expiration of

six years from the date of the judgment pursuant to O 46 r 2(1)(a) of the RHC, a bankruptcy notice issued after six years without leave of the court is void.

[39] The first of the long line of cases often cited as authority for this proposition is the case of *V Gopal, Re: ex p Bank Buruh (M) Bhd* [1987] CLJ (Rep) 602. Justice VC George (as His Lordship then was) in this case construed the proviso to s 3(1)(i) as limiting a judgment creditor who could file a bankruptcy notice to those creditors falling within the definition of a creditor in the proviso. His Lordship then defined such a creditor to be:

> What the proviso to s 3(1)(i) does is to define a creditor who has obtained a final judgment or final order within the meaning of that section as being 'any person who is for the time being entitled to enforce a final judgment or final order'. On the day that the bankruptcy notice was served, since six years had lapsed form the ate of the judgment the petitioner was not entitled to enforce the judgment as he had not obtained the requisite leave as prescribed by O 46 r 2(1)(a).

[40] His Lordship's interpretation of s 3(1)(i) was to exclude access to s 3(1)(i) to judgment creditors who failed to comply with O 46 r 2(1)(a). His Lordship's reasoning was that the proviso had to be read together with O 46 r 2(1)(a) and when so read, a judgment creditor who could not execute his final judgment in the manner contemplated by O 46 r 2(1)(a) is deemed to be not entitled to enforce his judgment and consequently issue a bankruptcy notice. His Lordship's interpretation of the proviso in this manner has received judicial support in a number of cases decided thereafter including in the cases of *Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd* [1989] 3 MLJ 508; *Re Lee Che Peh aka Lee Chee Peh, ex p Tractors Malaysia (1982) Sdn Bhd* [2003] 5 MLJ 463, *Tengku Iskandar bin Tengku Ahmad v Sime Bank Bhd* [2002] 1 MLJ 312; [2002] 1 AMR 174 and *Chin Sin Lan v Delta Finance Bhd* [2004] 3 MLJ 178.

[41] When this ground of appeal was raised before the learned judge, His Lordship followed the decision of Tun Abdul Hamid Mohamad FCJ and refused to follow the pronouncements of Justice George in the earlier case of *V Gopal, Re: ex p Bank Buruh Bhd*. His Lordship followed this course of action because he felt bound by the decision in *Perwira Affin Bank Bhd*, this case being a decision of the Federal Court and *V Gopal, Re: ex p Bank Buruh Bhd* a decision of the High Court. Before us, learned counsel for the appellant submitted that the learned judge erroneously considered the decision in *Perwira Affin Bank Bhd* to be binding on His Lordship because it was clear from the judgment of the Federal Court that leave had been granted by the court to determine solely whether the second limb of the Limitation Act was applicable to the bankruptcy proceedings. With respect, we agree with the submission of counsel since it evident from the judgment of the court that the interplay

between the proviso and O 46 r 2(1)(a) was an issue before the High Court before being abandoned by the appellants upon the respondent's producing proof that leave had been obtained.

[42] Notwithstanding my decision that the pronouncements of Tun Abdul Hamid Mohamad FCJ were obiter, I now propose to examine His Lordship's pronouncements to ascertain the reasons behind the same. The pronouncements of Tun Abdul Hamid Mohamad FCJ on the interplay between the proviso and O 46 r 2(1)(a) were that:

> This is not a bankruptcy case. It is a summons in chambers in the main writ action in which judgment had been obtained but the judgment sum had not been satisfied. In the summons in chambers, the plaintiff applied for leave to proceed to execution to enforce the judgment notwithstanding that six years had elapsed since the judgment was entered. The application was made pursuant to RSC O 42 r 23(a) (England) which provides that where six years have elapsed since the date of the judgment, the party alleging himself to be entitled to execution may apply to court or a judge for leave to levy execution. The argument put forward was that RSC O 42 r 23(a) was invalid as it was in conflict with s 2(4) of the (English) Limitation Act 1939.
>
> It should be noted that first, the provisions of RSC O 42 r 23(a) is similar to the provisions of our O 46 r 2(1) of the RHC 1980.
>
> The Court of Appeal (England) rejected that argument. The court held that RSC O 42 r 23(a) was not rendered invalid by the provisions of s 2(4) of the (English) Limitation Act 1939. The court drew a distinction between 'execution' in RSC O 42 r 23(a) and the word 'action' in s 2(4) of the Limitation Act 1939. The court held that O 42 r 23(a) dealt solely with execution which is essentially a matter of procedure for the purpose of enforcing a judgment when obtained. On the other hand, s 2(4) of the Limitation Act 1939 is concerned with the right to sue on a judgment, a plaintiff who has obtained a judgment more than six years is not entitled to issue execution on it except with the leave of the court or a judge as provided by O 42 r 23(a) (of the English Rules).
>
> It is this last sentence above that the case is an authority for. Furthermore, if we bear in mind that the words used in our O 46 r 2 of the RHC 1980 and in the English Rules are 'A writ of execution to enforce a judgment …', clearly a bankruptcy notice or a bankruptcy petition cannot be 'a writ of execution'. So, in my view, our courts have been correct in holding the view that no leave of Court is necessary to issue a bankruptcy notice after six years as required by O 46 r 2 of the RHC 1980. But, that does not answer the question posed to this court especially in view of the words 'or any other proceeding in court'. I shall come back to this later.

[43] His Lordship's reasoning for his conclusion that O 46 r 2(1)(a) has no relevance to bankruptcy proceedings is because according to His Lordship:

> We have seen from the decided cases and I agree that a bankruptcy proceeding is not 'a writ of execution' within the meaning of O 46 r 2 of the RHC 1980. But, that does not necessarily mean that it is therefore 'an action' within the meaning of s 6(3). We

still have to consider the meaning of 'an action upon any judgment' in the light of the definition given in s 2 of the Limitation Act 1953 that includes 'a suit or any other proceeding'.

Of course, by merely looking at the word 'action' in s 6(3) it appears that the word 'action' does not include a bankruptcy proceeding. It is also clearly not a 'suit', one of the words used in the definition of the word 'action' in s 2. But, is it not a 'proceeding in a court of law' 'upon any judgment' (I am reading the provisions in ss 2 *and* 6(3) together).

I do not think that it can be argued that a bankruptcy proceeding is not proceeding in court. Neither can it be argued that it is not based upon a judgment. There has to be a judgment before a bankruptcy proceeding can be commenced. Then going by the definition of 'action' in s 2, it is an 'action' and an action upon a judgment.

A question then may be asked: on the same reasoning, is an 'execution' not a 'proceeding in court'? Of course it is a proceeding in court but, I think, the distinction lies in the fact that execution is the continuation of the existing proceeding to enforce the judgment provided by the same rules of court, the RHC 1980. On the other hand, bankruptcy proceedings are provided by separate law and rules, the focus being the judgment debtor, not the debt and the object is to appoint a receiver in the person of the official assignee over the assets of the debtor and to convert the status of the debtor into a bankrupt within certain disqualification and disabilities, the most important being the loss of control over his properties to the official assignee.

The fact that it is based on a judgment does not necessarily make it a continuation of the existing proceeding. Section 6(3) itself is about 'action upon a judgment'. Though the existence or non-existence of a cause of action may or may not be a factor to be considered, if we say that for there to be action there must be a cause of action, then the existence of a judgment and the failure to satisfy the judgment debt itself is a cause of action. In any event, it is a remedy provided by laws, whether it is to be considered as a cause of action or not, if relevant. Furthermore, a bankruptcy proceeding is by way of petition, just like divorce, winding-up or election, to name a few. Thus a bankruptcy proceedings bears the characteristics of a fresh proceeding unlike an execution proceeding.

On these grounds, I am inclined to the view that a bankruptcy proceeding, by definition of the word 'action' in s 2 of the Act is an 'action' and it is caught by the provisions of s 6(3).

[44] In other words, in essence Tun Abdul Hamid Mohamad FCJ's reasoning was that since bankruptcy proceedings fall within the definition of an 'action' under s 6(3) of the Limitation Act, a judgment creditor has 12 years to pursue bankruptcy proceedings. By the same token since bankruptcy proceedings are not execution proceedings, O 46 r 2(1)(a) is not applicable to determine the validity of a bankruptcy notice.

[45] I now propose to examine the reasoning behind the decision in *V Gopal, Re ex p Bank Buruh (M) Bhd*. In my judgment, Justice George inexplicably

equated the word 'enforce' in the proviso to 'execution' in the context of O 46 r 2(1)(a). By reason thereof, His Lordship opined that since 'on the day that the bankruptcy notice was served, since six years had lapsed from the date of the judgment the petitioner was not entitled to enforce the judgment as he had not obtained the requisite leave as prescribed by O 46 r 2(1)(a)'. His Lordship cited no authority for this reasoning other than to infer that the words 'entitled to enforce' refers to enforcement of judgment by way of execution. His Lordship did not consider s 6(3) of the Limitation Act or whether bankruptcy proceedings were a form of execution proceedings.

[46] I agree with Tun Abdul Hamid Mohamad FCJ that the word 'enforce' is distinct from the word 'execute' because execution is a continuation of the existing proceedings to enforce the judgment provided by the same Rules of Court, the RHC 1980. Bankruptcy proceedings, on the other hand, are governed by separate law and rules, the focus being the judgment debtor, not the debt and the object is to appoint a receiver in the person of the official assignee over the assets of the debtor and to convert the status of the debtor into a bankrupt with certain disqualification and disability, the most important being the loss of control over his properties to the official assignee (per Tun Abdul Hamid Mohamad FCJ at p 801 of *Perwira Affin Bank Bhd*). Justice Brandon (as His Lordship then was) in the case of *Berliner Industriesbank Aktiengesellschaft v Jost* [1971] 1 QB 278 pronounced the distinction between enforce and execution in this manner:

> In my view the word 'enforceable' in s 2(4) of the Limitation Act 1939 does not have the meaning which this argument ascribes to it. I think it means 'enforceable by action on the judgment' and not 'enforceable by execution on the judgment' …This distinction between the right to sue on a judgment (which is a substantive right) and the right to issue execution under it (which is a procedural right or remedy) has always been recognized in the law of limitation: see *WT Lamb & Sons v Rider* [1948] 2 KB 331, where the history of the matter is reviewed.

In my judgment, what the pronouncements in these two cases demonstrate is that there was no justification for Justice George to have equated the word 'enforce' to 'execution' in His Lordship's construction of the proviso to s 3(1)(i) of the Bankruptcy Act in determining who is a creditor for the purposes of this provision.

[47] With respect, even if Justice George was right to equate the word 'enforce' with 'execution', it is quite another thing to equate execution with writ of execution as provided in O 46 r 2(1). In this respect, it must be borne in mind that in O 46 itself, five forms of execution are acknowledged as being available to a judgment creditor to execute his judgment. In my opinion no matter how extended a meaning is attached to the words 'writ of execution' (see the decision of Justice Suriyadi (as His Lordship then was) in *Tengku Iskandar bin Tengku Ahmad v Sime Bank Bhd* [2002] 1 MLJ 312; [2002] 1 AMR 174, it

cannot encompass bankruptcy proceedings. This is because writs are issued by the court and the form of a writ of execution is to be found in appendix A to the Rules of the High Court 1980 unlike a bankruptcy notice which is issued in a form prescribed in the Bankruptcy Rules. Indeed that bankruptcy and execution are poles apart is best demonstrated by the provision in the Bankruptcy Rules that the rules of the High Court have no application to bankruptcy proceedings (see r 276 of the Bankruptcy Rules 1969). Furthermore, the English Courts have consistently and over a long period of time held bankruptcy proceedings to be not execution proceedings. Indeed, Justice George acknowledged the correctness of the English decisions and adopted the pronouncements in two of the cases in *V Gopal, Re: ex p Bank Buruh (M) Bhd*. His Lordship quoted Lord Cozens Hardy as having said the following words at p 525 of the reported judgment:

> … now 'execution on the judgment' is a technical term. It is a legal process by which the judgment creditor, in that character and for his sole benefit, by a proceeding in the same action seeks to satisfy his judgment wholly or partially. I think it is plain that a winding up petition is not execution on a judgment. It lacks almost every element of such an execution …

In the context of *Re A Bankruptcy Notice* [1898] 1 QB 383 Chitty LJ said at p 386:

> … the issuing of a bankruptcy notice is clearly not a process of execution upon the judgment …

and at p 387, Collin LJ said:

> … It would be impossible to argue that the issue of a bankruptcy notice is a form of execution.

Justice George, however, without assigning any cogent reason held that these pronouncements were:

> No answer to the application of s 3(1)(i) to decide whether the creditor had on the day the bankruptcy notice was served a final judgment within the meaning of the said sub section without which the bankruptcy notice would be bad
>
> (see p 604 of the reported judgment of the court).

[48] Apart from citing the pronouncements of Justice George in *V Gopal, Re ex p; Bank Buruh Bhd*, counsel for the appellant claimed that His Lordship Edgar Joseph Jr (as His Lordship then was) in the case of *Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd* [1989] 3 MLJ 508 after examining the equivalent English provisions had occasion to comment that it has been the law of England for more than 100 years that 'if execution cannot be issued at all, no bankruptcy notice can be issued. if the execution can be issued only with

the leave of the court, the creditor must obtain such leave before he can issue a bankruptcy notice' (see p 510 of the reported judgment of the court at (1989) 3 MLJ 509).

[49] His Lordship's comments were based on two old English cases. With respect, whilst the two English cases may be authorities for the proposition of law propounded by His Lordship Edgar Joseph Jr as regards the position in England, they certainly are not authorities for the proposition of law put forward by counsel for the appellant based on the ratio of *V Gopal, Re: ex p; Bank Buruh (M) Bhd*. I opine to this effect because a careful examination of the two cases will reveal that on the facts of the two cases, execution was not possible for reasons which had nothing to do with the fact that six years had expired from the date of judgment. In the case *Re Ide, ex p Ide* (1886) 17 QBD 755 (fold) and *Re Woodall, ex p Woodall* (1884) 13 QBD 479 (fold), the English Court of Appeal was concerned with whether a creditor who had obtained judgment against a partnership firm can issue a bankruptcy notice against a partner of the firm without obtaining leave of the court. As in Malaysia, there is a requirement that leave of court is necessary to enforce the judgment against a partner of the firm when the judgment is against the firm only. Since on the facts of the case, leave had not been obtained to issue execution against the partner, the court refused, in my judgment correctly to allow the issuance the bankruptcy notice against the individual partner.

[50] In the case of *Re Woodall, ex p Woodall*, the English Court of Appeal was concerned with whether the wife of a deceased judgment creditor qualified as a creditor within the meaning of the relevant bankruptcy legislation so as to issue a bankruptcy notice in respect of a judgment obtained by her late husband. The English Court of Appeal, again, in my judgment correctly ruled that it was only the original creditor who could issue a bankruptcy notice without the leave of the court. This is evident from the following passage in the judgment of Baggallay LJ:

> The original creditor is in that position, if there has been no stay of execution. If the person who applies for the notice is the executor of the original judgment creditor he does not, as I read the sub-section, fill the required character until he has obtained leave to issue execution on the judgment. On this ground I think that the appeal must be allowed, and the receiving order be discharged.

[51] The only instance when this court had occasion to consider the decision in *V Gopal, Re: ex p; Bank Buruh (M) Bhd* and *Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd* was in the case of *Chin Sin Lan v Delta Finance Bhd* . JCA Gopal Sri Ram (as His Lordship then was) writing the judgment of the court opined that Justice George's interpretation of the proviso had the support of English cases on the parallel English provision. With respect, Justice George's decision makes no reference to any English case other than the cases

that bankruptcy is distinct from execution. As regards the decision of Justice Edgar Joseph I have already demonstrated why it is unsafe to follow the decision of the court in that case. In any event, I am not bound by the decision of this court in *Chin Sin Lan v Delta Finance Bhd* on this issue since the court in that case was required to decide on the interpretation of the provisions of the Limitation Act of Sarawak. Accordingly, JCA Gopal Sri Ram's approval of the decisions in *V Gopal, Re: ex p; Bank Buruh Bhd* and *Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd* were clearly obiter.

[52] In my judgment, the reasoning of Tun Abdul Hamid Mohamad FCJ in arriving at His Lordship's conclusion that bankruptcy proceeding can be instituted without the leave of the court for a period of 12 years based on s 6(3) of the Limitation Act is to be preferred to that of Justice George limiting its validity to six years save with the leave of the court based on O 46 r 2(1)(a). For this reason, I find no merit on the first ground raised by counsel for the appellant in this appeal.

SECOND GROUND

[53] Counsel for the appellant relying on the judgment of this court in *J Raju a/l M Kerpaya v Commerce International Merchant Bankers Bhd* [2000] 3 MLJ 177 submitted that the bankruptcy notice was void since it did not comply with the terms of the judgment of the court of 7 June 2002. The non-compliance being that the judgment of the court ordered for interest to commence from the *tarikh matang* ie maturity date, whereas the bankruptcy notice included interest from 21 March 2000. Counsel for the appellant submitted that since 21 March 2000 was a date prior the date of judgment, the respondents could not possibly have had this date in mind as, in that event, the date being a date before the order of the judgment would have been included in the statement of claim. With respect, I am unable to agree with counsel for the appellant since so long as the bankruptcy notice includes a date in accordance with the judgment of the court, there is no basis for the application of the principle of law enunciated by this court in *J Raju a/l M Kerpaya v Commerce International Merchant Bankers Bhd* . On the facts of this case, it is evident from the contents of para 6 of the 'Affidavit Balasan' of the respondents that the maturity date was 20 March 2000. I opine to this effect because at the hearing of the appellant's application to set aside the bankruptcy notice, the learned registrar dismissed the same presumably because she accepted the maturity date to be 20 March 2000. The learned registrar must have made this finding because she accepted the averment in para 7 of the 'Affidavit Balasan' of Khaw Kok Wee that the commencement date for interest payable on the judgment sum is a matter involving quantum and accordingly ought to have been challenged by the appellant within seven days of the service upon him of the bankruptcy notice. Since it is an undisputed fact that no such challenge was

mounted by the appellant, it is no longer open to him to rely on this ground as a basis to challenge the validity of the bankruptcy notice. In this respect, I wish to observe that this court in the case of *Chin Sin Lan v Data Finance Bhd* held that objections of this nature should have been taken and challenged at the bankruptcy notice stage in the appropriate way prescribed by the Bankruptcy Rules 1969 and not at the appellate stage.

[54] Accordingly, I dismiss this appeal with costs.

Appeal allowed with costs.

Reported by Kohila Nesan